No. 959

In the Supreme Court of the United States

OCTOBER TERM, 1960

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, ET AL.,
PETITIONERS

v.

ELWOOD R. QUESADA, INDIVIDUALLY AND AS ADMINISTRATOR OF THE FEDERAL AVIATION AGENCY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ARCHIBALD COX,
WILLIAM H. ORRICK, JR.,
MORTON HOLLANDER,
EDWARD A. GROOBERT,
Department of Justice, Washington, D.C.

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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York denying the petitioners' motion for a preliminary injunction is reported at 182 F. Supp. 595 (App. 315a–321a).[1] The opinion of the Court of Appeals affirming the denial of that motion is reported at 276 F. 2d 892 (Pet. App. 65a–75a).[2] The decision of the District Court granting the respondent's motion for dismissal

[1] App.—refers to the appendix filed by the petitioners in the Court of Appeals in Case No. 26174.

[2] Pet. App.—refers to petitioners' appendix in their petition for certiorari.

of the complaint is not reported (Pet. 2). The opinion of the Court of Appeals affirming the dismissal of the complaint is reported at 286 F. 2d 319 (Pet. App. 76a–78a).

JURISDICTION

The judgment of the Court of Appeals affirming the dismissal of the complaint was entered on February 9, 1961. The petition for certiorari was filed on May 11, 1961, pursuant to an extension granted by Mr. Justice Harlan. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the imposition of a 60 year age limit for commercial air line pilots is a reasonable exercise of the authority of the Administrator of the Federal Aviation Agency to issue regulations to promote safety.

STATUTES AND REGULATIONS INVOLVED

The Federal Aviation Act of 1958, 72 Stat. 737, 49 U.S.C. 1301, *et seq.*, provides in pertinent part:

> SEC. 601 [72 Stat. 775, 49 U.S.C. 1421].
>
> (a) *Minimum standards; rules and regulations.*
>
> The Administrator is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time:
>
> * * * * * *
>
> (5) Reasonable rules and regulations governing, in the interest of safety, the maximum

hours or periods of service of airmen, and other employees, of air carriers; and

(6) Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedure, as the Administrator may find necessary to provide adequately for national security and safety in air commerce.

* * * * * *

SEC. 609 [72 Stat. 779, 49 U.S.C. 1429].

§ 1429. *Reinspection or reexamination; amendment, suspension, or revocation of certificates; notification; hearing; appeal to Board; judicial review.*

The Administrator may, from time to time, reinspect any civil aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, or may reexamine any civil airman. If, as a result of any such reinspection or reexamination, or if, as a result of any other investigation made by the Administrator, he determines that safety in air commerce or air transportation and the public interest requires, the Administrator may issue an order amending, modifying, suspending, or revoking, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate, or air agency certificate. Prior to amending, modifying, suspending, or revoking any of the foregoing certificates, the Administrator shall advise the holder thereof as to any charges or other reasons relied upon by the Administrator for his proposed action and, except in cases of

emergency, shall provide the holder of such a certificate an opportunity to answer any charges and be heard as to why such certificate should not be amended, modified, suspended, or revoked. Any person whose certificate is affected by such an order of the Administrator under this section may appeal the Administrator's order to the Board and the Board may, after notice and hearing, amend, modify, or reverse the Administrator's order if it finds that safety in air commerce or air transportation and the public interest do not require affirmation of the Administrator's order. * * *

Civil air regulations:

14 C.F.R. 40.260, 41.48, and 42.40, effective on March 15, 1960, provide in pertinent part:

> * * * No individual who has reached his 60th birthday shall be utilized or serve as a pilot on any aircraft[3] while engaged in air carrier operations.
>
> * * * * *

The Administrative Procedure Act, 60 Stat. 237, as amended, 5 U.S.C. 1001, *et seq.*, provides in pertinent part:

> § 1001. *Definitions.*
>
> As used in this chapter—
>
> * * * * *
>
> (c) *Rule and rule making.*
>
> "Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and in-

[3] In Regulation 42.40 the words "large aircraft" are used.

cludes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

(d) *Order and adjudication.*

"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

* * * * *

§ 1003. *Rule making.*

* * * * *

(a) *Notice; publication, and contents.*

General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the

rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) *Procedures.*

After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 1006 and 1007 of this title shall apply in place of the provisions of this subsection.

* * * * *

STATEMENT

Section 601(a) of the Federal Aviation Act of 1958, *supra*, p. 2, requires the Administrator of the Federal Aviation Agency to prescribe rules and regulations promoting safe air travel. Pursuant to this authority, the Administrator[*] and his medical staff began an extensive study of the aging process in order to determine whether the older pilots were physicially reliable to operate aircraft "with the highest possible degree of safety" (§ 601(b); App. 254a). The Administrator

[*] Najeeb Halaby was appointed Administrator of the Federal Aviation Agency on January 19, 1961. Mr. Halaby was substituted as defendant in this action on February 23, 1961, by the Court of Appeals for the Second Circuit.

regarded this problem of pressing importance because for the first time in aviation history there were a number of pilots aged sixty years or more (App. 255a).

The study revealed a progressive deterioration of many physiological and psychological functions as a person grows older, particularly a greatly increased susceptibility to sudden strokes and heart attacks (App. 256a). It also recognized that medical science is unable to predict with any degree of accuracy whether an individual is likely to suffer such a sudden incapacitation. Thus, a study of a large group of industrial employees showed that 85% of the employees who suffered a heart attack for the first time did so within six months to one year after a thorough physical examination in which the individual had been found to be in a condition normal to his age and without any evidence suggesting the imminence of such an attack (App. 256a).

Therefore, the Administrator determined that the existing regulations requiring rigorous periodic physical examinations of airmen did not adequately protect the public and that a maximum age limit for pilots was necessary (App. 256a–257a). The maximum was set at sixty after the Administrator learned that:

(1) statistical information compiled by the National Office of Vital Statistics showed that the mortality rate per one thousand white males from heart disease was 50 per cent higher between the ages of 60 to 64 than it was in the age group 55 to 59 (App. 257a–258a). The incidence of death from strokes in the 60 to 64 year old group was almost

twice that for the age group 55 to 59, and more than three times that for those in the 50 to 54 age group (App. 258a);

(2) a panel of experts in the field of aviation medicine and safety had agreed that a maximum age limitation of sixty should be established, while some even suggested that the maximum should be lower (App. 258a–259a); and

(3) inquiry made of the practices of five major foreign air carriers revealed that two had established retirement ages of 60 and two of 55 (App. 258a).

On June 27, 1959, the Administrator published in the Federal Register his intention to amend the Civil Air Regulations by establishing a 60 year age limitation for pilots (Pet. 4). In accordance with the rule making requirements of the Administrative Procedure Act, 5 U.S.C. 1003, *supra*, p. 5, interested parties were invited to submit written data and briefs. About 100 comments were filed, including those of the petitioner Pilots Association. The medical opinion received overwhelmingly favored the regulation. Accordingly, the Administrator issued on December 1, 1959, the 60 year age regulation, *supra*, p. 4.

Petitioner Air Line Pilots Association, a union of airline pilots, together with the individual petitioners, who are airline pilots, brought this suit in the District Court for the Southern District of New York seeking an injunction and a declaratory judgment that the regulation was null and void. They claimed that the rule was invalid because it allegedly had the effect of modifying and revoking pilots' certificates by limiting their duration without complying with the procedural

requirements of § 609 of the Federal Aviation Act of 1958 (App. 9a). The petitioners also asserted that the Administrator's action was unconstitutional because it deprived them of their property rights in the certificates without due process of law, and also because the action was arbitrary (App. 9a). Finally, the petitioners contended that the pilots were entitled to a hearing under the Administrative Procedure Act, 5 U.S.C. 1004 and 1008 (App. 9a).

The petitioners moved for a preliminary injunction. The respondent moved for summary judgment. The district court denied the motion for a preliminary injunction. On appeal, the Court of Appeals for the Second Circuit, in an opinion written by Chief Judge Lumbard and concurred in by Judges Hand and Hincks, rejected both of the petitioner's contentions, sustained the validity of the regulation and affirmed the denial of the preliminary injunction. The District Court then granted the respondent's motion for summary judgment, and dismissed the complaint. On a second appeal, the Court of Appeals, with Judges Lumbard, Medina and Smith sitting, again affirmed.

ARGUMENT

The petitioners seek review by this Court on the same grounds that they urged below. The decisions by the Court of Appeals that the safety regulation is not unreasonable and that the Administrator was not required by the Constitution, the Federal Aviation Act of 1958, or the Administrative Procedure Act to afford the pilots a hearing before issuing the regulation are correct. The petition should be denied.

1. There can be no serious challenge to the fact that the promulgation of this safety regulation constituted rule making. The Administrative Procedure Act, 5 U.S.C. 1001(c), *supra*, p. 4, defines a rule as "any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy * * *." See also Davis, *Administrative Law Treatise* § 5.01 (1958 ed.); Fuchs, *Procedure in Administrative Rule-Making*, 52 Harv. L. Rev. 259, 265 (1938). As the court below held, the regulation involved is just such a statement.

It follows that the Administrator was not required by the Administrative Procedure Act to hold hearings before issuing the directive. *Air Line Pilots Ass'n, Int'l* v. *Civil Aeronautics Board*, 215 F. 2d 122 (C.A. 2). A hearing is only required in connection with rule making when the "rules are required by statute to be made on the record after opportunity for an agency hearing * * *", 5 U.S.C. 1003(b), *supra*, p. 6. The Federal Aviation Act of 1958 does not contain such a requirement.

2. The petitioners argue that the regulation is void because it has the effect of amending, modifying, suspending or revoking pilots' certificates by limiting their duration[5] without compliance with the pro-

[5] It should be noted here that the petitioners' argument is based on the mistaken assumption that a pilot's certificate is of unlimited duration and that the 60 year age regulation amends or revokes the certificate because it limits the duration. Each certificate itself provides that "This certificate is of such duration as is provided in the currently effective

cedural requirements of § 609 of the Federal Aviation Act of 1958, *supra*, pp. 3–4. It is clear from the face of the statute and its legislative history that § 609 has no bearing on the rule making procedure, but applies only when an order of the Administrator is directed at an individual airman and concerns conduct and other facts peculiar to that airman.

Thus, § 609 provides that "the Administrator may * * * reexamine any civil airman", and if as a result of such reexamination the Administrator "determines that safety in air commerce * * * and the public interest requires, [he] may issue an order amending * * * or revoking * * * [any] airman certificate * * *." Further, the House Report states that the Administrator may, "after affording the person affected * * * an opportunity to be heard * * *, amend * * * the certificate in question." U.S. Code, Congressional & Administrative News, 1958, 3741, 3756.

If § 609 were applied to a safety regulation which affected certificates, the 18,000 certificate holders would be entitled to a hearing before adoption, then to an appeal to the Civil Aeronautics Board, and, finally, to judicial review of the Board's order. However, it is abundantly clear that Congress intended that the Ad-

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Civil Air Regulations, unless sooner suspended or revoked." (App. 286a–287a.) Therefore, it was contemplated at the time the certificate was issued that the holder's rights in the certificate are subject to limitation as to duration by a duly issued regulation, whether the regulation provided that the certificate would expire after one year, five years, or when the holder reached age 60. Since the pilots held the certificates at the will of the Administrator, the Administrator's action could not have deprived them of any substantial property rights.

ministrator was to "be given full safety rulemaking authority without review by the Civil Aeronautics Board" in order to prevent division of responsibility and duplication of effort, and to insure that there would be timely and effective safety rules. U.S. Code, Congressional & Administrative News, 1958, 3741, 3747. The constitutionality and validity of safety rules was to be determined in accordance with the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. 1009. U.S. Code, Congressional & Administrative News, 1958, 3741, 3746–47, 3761; Senate Report No. 1811, 85th Cong., 2d Sess. (1958), 10–12; Hearings before the Sub-Committee on Aviation of the Senate Committee on Interstate and Foreign Commerce on S. 3880, 85th Cong., 2d Sess., 165–166. Consequently, the application of § 609 to this situation could not be squared with the Congressional intention that the Civil Aeronautics Board should not have power to review safety regulations. As the Court of Appeals said:

> The elaborate procedural requirements of § 609 are patently incompatible with the expedition with which Congress intended that the Administrator should act in the promulgation of safety rules. The clear public interest in the speedy adoption of rules relating to air safety far outweighs any possible advantage in a multitude of piecemeal and time-consuming hearings brought by each contesting airman. [Pet. App. 73a.]

The petitioners' assertion that the safety regulation is invalid because it amends their certificates without

complying with § 609 is similar to the argument which this Court rejected in *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192. In *Storer*, the Federal Communications Commission, acting within its authority to promulgate general rules in the public interest, ruled that it would not grant broadcast licenses to parties who already owned interests in five other stations. The Federal Communications Act provided that applications for a license could not be denied without a hearing. This Court flatly rejected the contention that the regulation was invalid because it had the effect of denying certificates without a hearing.

3. The fact that pilots are affected by the regulation, because it results in the termination of some certificates and the limitation of the duration of others, did not require the Administrator to grant each petitioner a hearing before adopting the regulation. It is well settled that the exercise of a power to issue general rules need not be preceded by a hearing even though the rule limits or destroys property rights. *State Railroad Tax Cases*, 92 U.S. 575, 609–610; *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441; *Breiholz* v. *Board of Supervisors*, 257 U.S. 118; *Bowles* v. *Willingham*, 321 U.S. 503, 519–521; Davis, *Administrative Law Treatise* (1958 ed.), §§ 6.05, 6.12, 7.07. The agency is acting as a legislative body, *Bowles* v. *Willingham*, *supra*, and affording each affected individual a hearing would often destroy the agency's rule making power, *Bi-Metallic Investment Co.* v. *State Board of Equaliza-*

tion, supra. This certainly would be the case here if the Administrator had to grant each certificate holder, some 18,000 airmen, a hearing. The Court of Appeals stated:

> Administrative regulations often limit in the public interest the use that persons may make of their property without affording each one affected an opportunity to present evidence upon the fairness of the regulation. See *United States* v. *Storer Broadcasting Co., supra; Bowles* v. *Willingham*, 321 U.S. 503, 519-520 (1944). Obviously, unless the incidental limitations upon the use of airmen's certificates were subject to modification by general rules, the conduct of the Administrator's business would be subject to intolerable burdens which might well render it impossible for him effectively to discharge his duties. All changes in certificates would be subject to adjudicative hearings, including appeals to the courts, and each pilot whose license was affected—here some 18,000—might demand to be heard individually. [Court's footnote omitted.] [Pet. App. 71a.]

The cases the petitioners rely on are not pertinent here. They involved orders directed at specific parties rather than general policy decisions applicable to unnamed and unspecified persons. *Federal Communications Commission* v. *National Broadcasting Co., Inc.; (KOA)*, 319 U.S. 239; *L. B. Wilson, Inc.* v. *Federal Communications Commission*, 170 F. 2d 793 (C.A.D.C.); *Philadelphia Co.* v. *Securities Exchange Commission*, 164 F. 2d 889 (C.A.D.C.), vacated and

dismissed as moot, 337 U.S. 901; *In re Carter*, 177 F. 2d 75 (C.A.D.C.).[8]

4. The petitioners assert that the rule is unconstitutional because the Administrator's action was arbitrary. They ask this Court, in effect, to reverse the Administrator's judgment on the basis of a few items of evidence which the Administrator and his staff of experts had already considered. However, in reviewing rule making, the courts have traditionally limited their inquiry to a determination as to whether the regulation has a reasonable relation to a legitimate end. *Norman* v. *Baltimore & Ohio Railroad Co.*, 294 U.S. 240, 311; *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 224; *American Trucking Assns.* v. *United States*, 344 U.S. 298; *Air Line Pilots Ass'n, Int'l* v. *Civil Aeronautics Board*, 215 F. 2d 122 (C.A. 2). Clearly, the evidence that: the number of pilots over 60 years of age is increasing; that sudden incapacitation because of heart attack and stroke is more frequent as men approach age 60; that medical science is unable to determine in advance which individuals are likely to suffer such attacks so that the periodic examinations of the pilots are not a sufficient protection; and that aviation safety and medical experts advocated a maximum age of 60 or

[8] This issue is quite distinct from the question of whether a person affected by such a rule or regulation is entitled to a review of its legality. The fact that the regulation may be considered an "order" for the purposes of review, *Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407, does not mean that every person affected is entitled to the type of hearing provided for an adjudicative proceeding.

less, supports the Administrator's judgment that the regulation was necessary to protect the air travelling public.[7]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[7] The regulation was held reasonable in *Chew* v. *Quesada*, 182 F. Supp. 231 (D.D.C.).

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